AVEL CONSULTANTS SDN. BHD. & ANOR.

v.

MOHD. ZAIN YUSOF & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 336 OF 1984]
15 MARCH 1984

CIVIL PROCEDURE: *Application to dismiss or strike out writ and statement of claim - Writ taken out in names of companies - Whether taking out of writ authorised - Person taking out writ majority shareholder and managing director.*

The writ of summons with the statement of claim in the above action was caused to be issued in the names of the plaintiff companies at the instance of one Johari bin Jaalam, the managing director of the 2nd plaintiff and a director of the 1st plaintiff. Johari bin Jaalam, together with one Abdul Halim bin Mat, held majority shares in the companies. The writ was followed by an application in the names of the plaintiffs for certain interlocutory orders. The application was supported by an affidavit by Johari bin Jaalam. The 1st and 2nd defendants entered conditional appearance. The 3rd defendant entered an unconditional appearance and took out summons for the writ and statement of claim to be dismissed and/or struck out on the ground that the writ was caused to issue without authority. All the defendants were directors of the 2nd plaintiff, while the 1st and 2nd defendants were directors of the 1st plaintiff as well.

Held:

[1] The 1st plaintiff was in fact a subsidiary of the 2nd plaintiff.

[2] The allegations levelled at the defendants were serious and the contentions in the writ and statement of claim were neither frivolous nor vexatious. If the allegations were proved the consequences to the defendants could be very serious.

[3] Johari bin Jaalam had authority to commence the legal proceedings.

(a) The managing director of a company has implied authority to commence legal proceedings in the name of the company.

(b) The doctrine of agency of necessity in any case imposes a duty on such a person to act on behalf of the company and, if necessary, even to commence legal proceedings in the name of the company, to preserve the property of the company.

(c) Further, in the absence of contractual terms to the contrary, it is the majority vote of the company in general meeting that has the ultimate say in matters pertaining to the business of the company and those in command of the majority vote may function as agents of necessity to preserve the property of the company but at their peril and subject to their being able to show that they have the support of the majority.

[Application dismissed.]

Cases referred to:

Danish Mercantile Co. Ltd. & Ors. v. Beaumont & Anor. [1951] 1 All ER 925
Marshall's Valve Gear Co. Ltd. v. Manning, Wardle & Co. Ltd. [1909] 1 Ch 267
Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd. [1975] 2 All ER 424

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 1, p. 157, para. 373
Gower's Modern Company Law, 3rd Edn., pp. 136, 137
The Companies Acts, Buckley**,** 12th Edn., p. 169

For the plaintiffs - Gopal Sri Ram (Liza Chan with him); M/s. Sri Ram, Zulkifly & Kumar
For the defendants - Dulip Singh; M/s. Dulip Singh & Co.

JUDGMENT

VC George J:

(On enclosure 15)

The writ of summons (with the statement of claim) in this action was caused to be issued in the names of Avel Consultants Sdn. Bhd. and Elmec Consultants Sdn. Bhd. as 1st and 2nd plaintiffs respectively on 15 February 1984 against the three defendants named in the writ. This was followed by the application (encl. (3) now before me) taken out in the names of the aforesaid plaintiffs for certain interlocutory orders which application was supported by an affidavit by one Johari bin Jaalam who was at all relevant times the managing director of the 2nd plaintiff and also a director of the 1st plaintiff. The writs were caused to be issued at the instance of Johari bin Jaalam as was the application for the interlocutory orders.

All the defendants were directors of the 2nd plaintiff and the 1st and 2nd defendants were directors of the 1st plaintiff as well. The 1st and 2nd defendants entered conditional appearances to the writ. Apparently they intend shortly to apply to the Court to have writ struck off on the ground that the plaintiff companies had not authorised the taking out of the writ.

The 3rd defendant entered an unconditional appearance and has taken out the summons which is encl. (15) in the Court's file and asks for the writ and the statement of claim and the summons (encl. (3)) "to be dismissed and/or struck off" substantially on the ground that the writs were caused to issue without authority.

I decided to hear the summons taken out by the 3rd defendant and stood down the summons for the interlocutory orders taken out by the plaintiffs.

The affidavits filed by the parties show that of the issued share capital of 100,000 shares of the 2nd plaintiff company Johari bin Jaalam as the holder of 60,000 of those shares has had and has a controlling interest in the 2nd plaintiff company. It has been pointed out that 5,000 of those shares he holds in trust for the 3rd defendant but even assuming that Johari bin Jaalam could not vote as he pleased in respect of those 5,000 shares, with the remaining 55,000 shares he still has had and has control of the company. On top of that another shareholder, Abdul Halim bin Mat who holds 10,000 shares has thrown in his lot with Johari bin Jaalam. It is beyond argument that at any general meeting of the 2nd plaintiff, Johari bin Jaalam's votes with or without the support of Abdul Halim's votes would carry the day.

The 1st plaintiff company's issued share capital is 50,000 fully paid up shares which are held, 15,000 in the name of Johari bin Jaalam, 15,000 in the name of Abdul Halim bin Mat and 20,000 in the name of Mohd. Zain bin Yusof who is the 1st defendant. Johari and Abdul Halim say that those shares in the 1st plaintiff company have been and are held by them and by Mohd. Zain bin Yusof as trustees for the 2nd plaintiff company. At p. 36 of the bundle of exhibits attached to the affidavit of Johari bin Jaalam (which is encl. (2) in the Court's file) is a paragraph of a letter written by Johari bin Jaalam as managing director of

the 2nd plaintiff company to the 1st defendant Mohd. Zain bin Yusof which letter is the letter of appointment of Mohd. Zain bin Yusof as a director of the 2nd plaintiff. The said paragraph reads:

> A new firm Avel Consultants Sdn. Bhd. specialising in broadcasting consultancy have been formed for you. All expenses, etc. are being borne by Elmec Consultants Sdn. Bhd. You are personally required along with other nominated directors of Elmec to hold the share of Avel in trust for Elmec.
>
> Your own benefits in terms of personal shareholding in Avel initially with other key staff will be reviewed once Avel is able to stand on its own feet.

The letter is acknowledged by the 1st defendant by an endorsement at the bottom to the effect that he agrees with the terms and conditions set out in the letter.

With Abdul Halim bin Mat and Johari bin Jaalam stating that the shares in the 1st plaintiff were held by them and by the 1st defendant as trustees for the 2nd plaintiff and in the face of the aforesaid letter of appointment and there being no other evidence on the issue, on a balance of probability I find (for the purposes of this application) that in fact of the aforesaid Letter of appointment and there being no other evidence on the issue, on a balance of probability I find (for the purposes of this application) that in fact those shares have been and are held in trust for the 2nd plaintiff. It follows that the contention by Johari bin Jaalam that the 1st plaintiff is in fact a subsidiary of the 2nd plaintiff is well founded.

Now the substantial complaint levelled against the defendants and each of them by means of the writ is that the defendants, in breach of their legal and fiduciary duties as directors of one or the other or both the plaintiff companies, formed the partnership known as Perunding AJZ for the purpose of carrying on and are carrying on trade and business similar to that carried on by the plaintiffs and in direct conflict with the plaintiff companies. In the statement of claim certain specific activities of perunding AJZ said to conflict with the interest of the plaintiffs are alleged and particulars of loss and damage allegedly arising therefrom are set out. By the writ the plaintiffs seek *inter alia* to restrain the defendants from carrying on activities in conflict with the plaintiffs and thereby prevent further loss and damage and for a declaration that the defendants are trustees for the plaintiffs in respect of all professional charges received by Perunding AJZ and for further and other orders consequential thereto.

The allegations are serious and if proved the consequences to the defendants could be very serious indeed. The affidavits filed in relation to the pending interlocutory application demonstrate that the contentions made in the writ and statement of claim are not frivolous and vexatious.

As has been seen the 3rd defendant asks for the writ and the statement of claim (and the summons (encl. 3) to be dismissed and/or struck off. He says that there has been no Board decision or of any general meeting of either of the plaintiff companies to cause the writ to issue and that therefore the writs were issued without due authority and should be dismissed or struck off.

He also says that Johari bin Jaalam stating in para. 1 of his affidavit affirmed on 14 February 1984 (encl. 2) that he was duly authorised to affirm the affidavit on behalf of both the plaintiff is incorrect in that there has not been any Board decision or decision of any general meeting of the company to that effect.

Encik Dulip Singh of Counsel for the defendants advanced the argument that on the strength of *Danish Mercantile Co. Ltd. & Ors. v. Beaumont & Anor.* [1951] 1 All ER 925 there should, at worst, be a stay of the proceedings in that the action cannot be said to be properly constituted. In that case at p. 930 Jenkins LJ said:

> I think the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to say: "I approve of all that has been done in the past and I instruct you to continue the action." When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority.

Johari bin Jaalam by a further affidavit concedes that it was at his instance that the writ was caused to be issued and that he did not have the specific authority of a Board meeting or of a general meeting of either of the plaintiffs to do so or to affirm affidavits on behalf of the plaintiffs or either of them.

However, it was pointed out that he and Abdul Halim bin Mat held and hold more than 50% of the shares in each of the plaintiff companies and it was contended that in the face of the activities of the defendants which it is alleged has caused and continues to cause injury to the plaintiff companies, an action had to be brought by the two plaintiff companies and that since it was obvious that the defendants would not at Board level allow the actions to be brought against them it would have to be the company in general meeting that could authorise the bringing of the action. And since the outcome of any motion at such a meeting to cause the writ to issue was obvious and foregone conclusion in that Johari and Abdul Halim owned or controlled more than 50% of the shares, having such a meeting was not necessary. It was argued on behalf of the plaintiff companies that in the circumstances since the writs were issued at the instance of the majority shareholders the application for the writs to be dismissed, struck off or even stayed should be refused.

In *Danish Mercantile Co. Ltd. (supra)* at p. 929 line G3 Jenkins LJ said:

> ... I would refer to a passage in *Buckley on the Companies Acts*, 12th Edn., at p. 169, where the relevant law is, in my view, correctly summarised. The passage occurs in the course of a discussion as to the circumstances in which a company's name can be used as plaintiff in an action and the exceptions to the general rule that a company is the only proper plaintiff in respect of a wrong done to the company - a discussion, in short, of the aspect of company law related to what is commonly called the rule in *Foss v. Harbottle.*
>
> The relevant passage for the present purpose is in these terms.
>
> 6. If the case be one in which the company ought to be plaintiff, the fact that the seal is in the possession of the adverse party will not necessarily preclude the intending plaintiffs from using the company's name. Neither will it be necessary to obtain the resolution of a general meeting in favour of the action before the writ is issued. In many cases the delay might amount to a denial of justice. In a case of urgency the intending plaintiffs may use the company's name, but at their peril, and subject to their being able to show

> that they have the support of the majority. In an action so constituted, the Court may give interlocutory relief, taking care that a meeting be called at the earliest possible date to determine whether the action really has the support of the majority or not.
>
> That passage, where it refers to the calling of a meeting, accords with the well-settled practice of the Court in cases in which, in proceedings brought by a company, a dispute arises as to the authority with which the company's name has been used as plaintiff. It is common practice in such cases to adjourn any motion brought to strike out the company's name with a view to a meeting being called to see whether the company desires the action to be brought or not ...

In *Marshall's Valve Gear Co. Ltd. v. Manning, Wardle & Co. Ltd* [1909] 1 Ch 267 in a situation not unlike the situation obtaining in the instant case, Neville J refused a motion to direct the removal of the writ which had been caused to issue without a Board or general meeting decision. In that case the managing director who had caused the writ to issue controlled the majority of the shares of the company. At the top of p. 272 Neville J said:

> ... Mr. Marshall has commenced an action in the name of the company for the purpose of restraining an alleged infringement on the part of the owners of the new patent, and the other directors come to the Court and ask to have the writ in that action taken off the file on the ground that the action was commenced without the authority of the company. It is admitted that the calling of a meeting of shareholders to ascertain the wishes of the company would be useless because the position of the voting power is perfectly well understood. It is divided between the persons concerned, and undoubtedly the managing director, who has commenced this action, would have the majority of votes at a general meeting, and, therefore, if it is right that effect should be given to the wishes of the majority of the company in the present case, it is admitted that no object is to be gained by calling a meeting, because the result of that meeting is a foregone conclusion. Under those circumstances ought the Court to direct the removal of the writ?

The Judge answered that question at the bottom of p. 273:

> ... it is obvious, I think, that I ought not to interfere with the progress of the present action, because it is brought with the approval of the majority of the shareholders in the company, and, upon the decisions which I have referred to, they are the persons who are entitled to say, aye or no, whether the litigation shall proceed.

In *Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd.* [1975] 2 All ER 424, 429 (top), Lord Hailsham in discussing the powers of general meetings referred with approval to a passage from *Gower's Modern Company Law* in which passage *Marshall's Valve Gear Co. Ltd.* was cited with approval. The passage in *Gower's* (3rd Edn.) pp. 136, 137 reads:

> It seems that if for some reason the board cannot or will not exercise the powers vested in them, the general meeting may do so. On this ground, action by the general meeting has been held effective where there was a deadlock on the board, where an effective quorum could not be obtained, where the directors are disqualified from voting, or, more obviously, where the directors have purported to borrow in excess of the amount authorised by the articles. Moreover, although the general meeting cannot restrain the directors from conducting actions in the name of the company, it still seems to be the law (as laid down in *Marshall's Valve Gear Co. v. Manning, Wardle & Co.)* that the general meeting can commence proceedings on behalf of the company if the directors fail to do so.

It seems to me that the doctrine of Agency of Necessity is not without application in this case. In *Halsbury's Laws of England* 3rd Edn. Vol. 1 p. 157 para. 373 deals with the application of the doctrine, portions of which read as follows:

Agency of necessity arises wherever a duty is imposed upon a person to act on behalf of another apart from contract, and in circumstances of emergency, in order to prevent irreparable injury. It may also arise where a person carries out the legal or moral duties of another in the absence or default of that other, or acts in his interest to preserve his property from destruction.

The conditions which entitle an agent to exceed his authority under the doctrine of necessity are (1) that he could not communicate with his principal; (2) that the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take; and (3) that he acted *bona fide* in the interest of the parties concerned. At the same time, though a strong case is required, it is not essential that any other course shall be an impossibility.

In my judgment in the absence of express limitations to the contrary, the managing director of a company has the implied authority to commence legal proceedings in the name of the company. I would go so far as to say that where the situation is such that the reasonable and prudent course to take was to go to Court then in fact the managing director could be defaulted for not having done so.

The position is that in respect of a managing director of a company apart from an implied term in his contractual relationship with the company the doctrine of Agency of Necessity would impose a duty on him to act on behalf of the company, and if necessary even to commence legal proceedings in the name of the company, to preserve the property of the company.

Similarly, in the absence of contractual terms to the contrary it is the majority vote of the company in general meeting that has the ultimate say in matters pertaining to the business of the company and those in command of the majority vote may function as agents of necessity to preserve the property of the company but "at their peril and subject to their being able to show that they have the support of the majority." (*Buckley on the Companies Acts* 12th Edn. 169).

The application encl. (15) was dismissed with costs.

Also found at [1984] 2 CLJ 169